

# DECISION



THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D.C. 20548

B-220282.2

FILE:

DATE: February 7, 1986  
Triple A Shipyards

MATTER OF:

## DIGEST:

1. Protest alleging improper actions of contracting officer at bid opening is untimely where protest was filed over 1 month after bid opening.
2. Bid which indicated "no bid" for one subitem and only offered bid on the alternative subitem is nonresponsive where the contract awarded included the subitem for which the "no bid" notation had been entered. By not bidding on both subitems, each of which requested a different material, the bidder assumed the risk that its bid would be unacceptable if the subitem not bid upon was included in the contract awarded.
3. Protest of alleged ambiguities and defects in solicitation is dismissed as untimely where the alleged ambiguities and defects were apparent on the face of the solicitation but were not protested until after the bid opening.

Triple A Shipyards (Triple A), a division of Triple A Machine Shop, Inc., protests the rejection of its bid as nonresponsive and award to Pacific Dry Dock and Repair Co. (Pacific) under invitation for bids (IFB) No. 8140-85-B-0042, issued by the National Park Service, Department of the Interior, for drydocking and repair of the Balclutha, an historic square rigged sailing ship. Triple A's protest is denied in part and dismissed in part.

The IFB was issued on July 26, 1985, and bids were submitted by three firms including Triple A and Pacific. Bid opening was on August 26, 1985. The bids submitted by Triple A and another bidder were determined to be nonresponsive and award was made to Pacific on September 10, 1985. We note that the other bidder was determined nonresponsive by the agency for reasons wholly unrelated to any of the matters raised by Triple A in its protest.

034473

In its initial protest letter, filed in our Office on September 17, 1985, Triple A argued that the agency should not have accepted Pacific's bid, since Pacific bid on each individual item on the bid schedule, but did not submit a total bid price for all items. This initial protest was dismissed by our Office without receiving an agency report on the issue. Triple A Shipyards, B-220282, Sept. 27, 1985, 85-2 C.P.D. ¶ 352. We held that since Pacific had entered a bid price for every item, it had in effect offered to perform as required under the solicitation and, thus, the failure to enter a total bid price did not render its bid nonresponsive. Triple A has not requested that we reconsider our September 27 decision and, therefore, we will not consider the issue further.

On September 27, 1985, Triple A filed a second protest letter in which it protested several other aspects of this procurement. Among other things, the protester objected to the actions of the contracting officer at the August 26 bid opening, specifically, the contracting officer's removal of Pacific's bid from the bid opening room in order to compute the total amount of Pacific's bid and his announcement of only Pacific's total bid price and not the prices bid by Pacific on the individual line items.

Our Bid Protest Regulations provide that a protest must be filed within 10 days after the protest grounds were known or should have been known. 4 C.F.R. § 21.2(a)(2) (1985). Since the contracting officer's allegedly improper actions were known to the protester at the time of bid opening--August 26--Triple A's protest of these actions which was filed with our Office on September 27--about 1 month after bid opening--is clearly untimely and will not be considered on the merits.

In its September 27 protest, Triple A also protests the contracting officer's rejection of its bid as nonresponsive and maintains that the award to Pacific was defective in that it did not include item 14, which was identified in the IFB as a "base bid item." We discuss these issues in turn.

There were 27 items set forth in the solicitation schedule: items 1 through 14 were designated as "base bid items," items 15 through 19 as "contingency items" and items 20 through 27 as "option items." Preceding the list of bid

items, the solicitation provided, in part, that "the bidder shall insert a bid price opposite each item listed below." Following the bid items, the solicitation stated:

"Award will be made to one bidder in accordance with the instructions to bidders. Determination of the low bidder will be based on the total bid including all contingencies and options."

Triple A indicated "no bid" on subitems 14a, 26a and 27a. The agency takes the position that Triple A's failure to bid on these subitems made its bid nonresponsive. Item 14 was for "Repair, Renewal of Main Weather Deck." Items 26 and 27 were, respectively, for repair and renewal of the main weather deck "Starboard" and "Port." Subitem "a" under items 14, 26, and 27 specified "With Teak Margins" and subitems "b" specified "With Fir Margins." In other words, Triple A bid only on fir margins under items 14, 26, and 27 and indicated "No Bid" for teak margins.

The file shows that award to Pacific under the solicitation included subitems 26a and 27a, but did not include item 14a. The agency advises that it was its intent to preserve its flexibility to choose the work to be performed under the contract until the bids were opened and the costs of alternate approaches were known. The agency further states that in view of the fact that the award includes items 26a and 27a, which included the repairs required under item 14, it determined that award of item 14 was unnecessary.

Triple A explains that it bid only on the fir alternate items under items 14, 26 and 27 because it was unable to obtain a firm commitment for timely delivery of "First European Quality Teak" as required in the solicitation's statement of work. Based on a statement in the solicitation indicating the agency's awareness of the shortage of the requested high grade teak, the protester states it presumed that it "had an alternate" and priced only the fir.

The solicitation's statement of work concerning items 26 and 27 provided that all material "shall conform" to the standards established by the statement of work for bid item 14. That statement of work provided with regard to

materials that "all margin planking shall be First European Quality Teak." This statement of work further provided that "Depending on availability of quality teak, an alternate method using douglas fir margin planking may be specified by the CO [contracting officer]." While the agency could have more clearly stated its intent to obtain teak margins, we believe that this language was sufficiently clear to place prospective bidders on notice that, if possible, the agency intended to make award for teak margin planking under items 14, 26, and 27. The option permitting the contracting officer to select douglas fir as an alternate material for the margin planking apparently was intended to address a situation where teak was either not available or was only offered at clearly unreasonable prices. It is clear under the solicitation that the determination as to whether teak or fir was to be used for the margin planking was a decision to be made by the contracting officer and not the bidders.

The term "no bid" normally is regarded as expressing a bidder's intention not to furnish an item so that a "no bid" of a required item results in an unacceptable bid. See James W. Boyer Co., B-187539, Nov. 17, 1976, 76-2 C.P.D. ¶ 433. Since the award included teak margin planking under items 26a and 27a, items for which Triple A indicated "No Bid," the contracting officer properly determined that the bid submitted by Triple A was ineligible for award. Where a bidder has bid under one alternate item, but has failed to bid another alternate, the bidder runs the risk that it would not be eligible for award should the government elect to accept an alternate not bid upon. See Casson Construction Company, Inc., B-198746, Oct. 24, 1980, 80-2 C.P.D. ¶ 318 at 3. We therefore deny Triple A's protest of the rejection of its bid.

Triple A also argues that the award to Pacific was defective because it omitted item 14, identified in the IFB as a "base bid item." As stated above, the agency states that in view of the fact that the award included items 26a and 27a, it determined that award of item 14 was unnecessary. In addition, the agency maintains that it was not required to award all base items since the solicitation incorporated by reference the contract clause set forth at Federal Acquisition Regulation (FAR), § 52.214-10, Federal Acquisition Circular 84-5, April 1, 1985, entitled "Contract

**Award-Sealed Bidding.** That clause provides in pertinent part that "[t]he government may accept any item or group of items in a bid, unless the bidder qualifies the bid by specific limitations."

Notwithstanding the cited clause, the solicitation did indicate that item 14 would be awarded since it was designated as a "base bid item" and was to be evaluated for award. While the agency never intended to issue an award encompassing all bid items, we do not believe that bidders reasonably could anticipate that any of the "base bid items" would be excluded from award. Moreover, it is well established that for purposes of award bid prices must be evaluated against the actual work to be awarded. South-eastern Services, Inc. and Worldwide Services, Inc., 56 Comp. Gen. 668 (1977), 77-1 C.P.D. ¶ 390; Linolex Systems, Inc., and American Terminals & Communications, Inc., 53 Comp. Gen. 895 (1974), 74-1 C.P.D. ¶ 296. However, here the agency's failure to award item 14 did not prejudice Triple A since the agency decided to repair the main weather deck using teak margins whereas Triple A only bid on the fir alternates for items 14, 26, and 27. Thus, Triple A would not have been eligible for award even if item 14 had been awarded. See Minnesota Mining and Manufacturing Co., B-212004, Nov. 17, 1983, 83-2 C.P.D. ¶ 578 at 3. By letter of today, we are recommending to the Department of the Interior that in similar future procurements it more clearly set out the manner in which items will be selected for award and that it set forth price evaluation criteria which will correspond to the base bid items actually awarded.

Triple A also alleges that the IFB is "confusing and capricious" in certain other respects. The protester points out that although the solicitation stated that the low bidder would be determined on the basis of the total price for all 27 items, the line on the same page which required bidders to insert a total bid price referred to "items 1 through 25." Triple A also argues that the IFB did not inform prospective bidders as to how bids were going to be evaluated with respect to base items 8, 11, and 14, as well as two contingent items and three option items.


Our Bid Protest Regulations provide that protests based upon alleged improprieties in a solicitation which are apparent prior to bid opening shall be filed prior to bid opening. 4 C.F.R. § 21.2(a)(1) (1985). Accordingly, since these alleged inconsistencies and ambiguities were apparent

B-220282.2

6

upon reading the IFB, Triple A's objection to the discrepancy between the solicitation's line for the bidder's "total bid" and the solicitation's bid evaluation scheme, as well as its objection to the ambiguity of the IFB regarding the evaluation of certain items, is untimely and will not be considered by our Office. See GM Industries, Inc., B-216297, May 23, 1985, 85-1 C.P.D. ¶ 588.

The protest is denied in part and dismissed in part.

  
Harry R. Van Cleve  
General Counsel